UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

Houston, Texas

DYNASTY INSULATION, INC.[1]

Employer

and

Case No. 16-RC-10612

INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS & ASBESTOS WORKERS LOCAL UNION NO. 22, AFL-CIO

Petitioner

DECISION AND ORDER

The Employer, Dynasty Insulation, Inc., is a mechanical insulating contractor headquartered in El Paso, Texas. The Petitioner, International Association of Heat & Frost Insulators & Asbestos Workers Local Union No. 22, AFL-CIO, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of approximately 15 employees consisting of all full-time and regular part-time hourly employees involved in the application of insulation materials and weatherproof jacketing employed by the Employer within the boundaries of Austin, Brazoria, Brazos, Chambers, Colorado, Fort Bend, Galveston, Grimes, Hardin, Harris, Jasper, Jefferson, Liberty, Matagorda, Montgomery, Polk, San Jacinto, Tyler, Waller, Washington and Wharton counties in the state of Texas.[2] The Petitioner seeks to exclude all other employees, all office clericals, and all

[1] The Employer's name appears as amended at the hearing.

[2] The proposed geographical scope of the unit is the same as the Union's geographical jurisdiction under its international charter. Although the Petitioner alleged that its geographical jurisdiction consisted of a 22 county area, the petition only lists 21 counties.

supervisors as defined in the Act. A hearing officer of the Board held a hearing and the parties filed briefs with me.

As evidenced at the hearing, the parties agree that the petitioned-for unit consists of employees classified as insulators and helpers/laborers. However, the parties disagree on (1) whether it is appropriate to direct an election based on the Employer's alleged imminent cessation of operations in the petitioned-for unit; and (2) if an election is appropriate, whether the geographic scope of the petitioned-for unit is appropriate.

The Employer contends that the petition should be dismissed because it is ceasing operations in the petitioned-for geographical area and thus an election would serve no useful purpose. According to the Employer, it only has one project in the petitioned-for area and a substantial majority of that project will be completed around October 22, 2004, at which time all petitioned-for employees will be laid off. The remaining portion of the project consists of approximately three to four weeks of work, which will be completed sporadically by two to three new hires over a period of time from around December 2004 to July 1, 2005. Other than this project, the Employer contends it has never performed work in the petitioned-for area, has no pending bids or projects and has no intention to bid on any future work in the petitioned-for area. The Employer further contends that even if it were not ceasing operations, the petitioned-for unit is inappropriate because the geographic scope should be limited to the specific project. The Petitioner, on the other hand, argues that the Employer is not ceasing operations because it is planning to expand its operations into the petitioned-for area and that the area-wide scope of the petitioned-for unit is appropriate.

Based on a preponderance of the record evidence, I conclude that the Employer's sole project within the scope of the petitioned-for unit will be substantially completed by around

October 22, 2004, at which time the Employer will lay off all employees encompassed within the petition. The record reflects that these employees do not have a reasonable expectation of recall or continued employment as the Employer does not maintain a transfer or recall policy other than at its local jobs in El Paso. After a several month lull in operations, the Employer intends to hire between two and three new employees to complete its remaining obligations under the contract. Because the remaining three to four weeks of work are contingent on outside scheduling, the remaining work will commence at the earliest around December 2004 and be completed, in intervals, by no later than July 1, 2005. The remaining Employer operations are very limited and none of the petitioned-for employees, much less a substantial and representative complement, will continue to be employed for any portion of this time. Significantly, the record revealed that the Employer has no prior history of performing projects in the petitioned-for area, has no additional pending contracts or bids in the petitioned-for area and has no intention to bid on future projects in the petitioned-for area. Based on the foregoing, I conclude that it would serve no useful purpose to conduct an election at this time and I shall dismiss the petition on that basis.[3] The factual basis and analysis for these findings follow below.

STATEMENT OF FACTS

The Employer is a mechanical insulating contractor engaged in business in the construction industry. The Employer's main office is in El Paso, Texas and performs between 90 to 95 percent of its work in West Texas and Southern New Mexico or its home area. Blanca Armendariz is the president and owner of the Employer. Rick Armendariz is the vice-president and owner of the Employer. Rick Armendariz is responsible for all of the Employer's job bidding, payment requests, job estimating and personnel polices and practices. Blanca and Rick

[3] In view of the determination made herein, it is not necessary to resolve any issues raised by the parties regarding the geographical scope of the petitioned-for unit.

Armendariz are responsible for all of the Employer's labor relations and clerical functions and do not employ any office or clerical staff. The parties stipulated that Rick Armendariz is a supervisor within Section 2(11) of the Act because he has the authority to hire and fire employees.

In its home area, the Employer presently is performing around 12 jobs and employs around 18 core employees consisting of insulators and helpers/laborers. These employees are relatively long term employees ranging in seniority from around 8 years to 12 years. The employer generally transfers these core employees from job to job in the home area. The base pay for these employees varies by seniority but falls in the range of $14 per hour. The Employer provides paid vacations to employees employed over six months.

Outside of its home area, the Employer does not maintain any recall or transfer policies for employees and does not employ any long-term employees. Instead, the Employer hires employees as needed by the project. At the time of the hearing, the Employer had one job under contract in College Station, Texas, Brazos County known as the College Station Medical Center job (College Station job).

At the time of the hearing, the Employer employed around 13 employees consisting of insulators and helpers/laborers on the College Station job. At the start of the job, the Employer employed seven employees and reached a maximum of 17 employees around August 2004. Other than these 17 employees, the Employer has never employed any other employees in the 21 county geographical area of the petitioned-for unit. As set forth earlier, the parties stipulated that all of the present employees are classified as insulators and helpers/laborers and would be appropriately included in the unit classifications if an election were ordered. The parties further stipulated that, if an election were ordered, the ***Steiny-Daniel*** construction industry election

eligibility formula would apply. *See* ***Daniel Construction Co.***, 133 NLRB 264 (1961), as modified in 167 NLRB 1078 (1967) and ***Steiny & Co.,*** 308 NLRB 1323 (1992) (employees who were employed by the Employer for a total of 30 days or more within the preceding 12 months or who have had some employment with the Employer in those 12 months and have been employed 45 days or more within the 24 preceding months.)

The College Station employees perform the same general insulation-type work as the insulators and helpers/laborers employed in the Employer's home area. The College Station employees are paid between $10 and $14 per hour and do not receive paid vacations or any other benefit.

In addition to the petitioned-for employees, the Employer employs one supervisor or superintendent, Sam Watson, on the College Station job. The parties stipulated that Watson is a supervisor under Section 2(11) of the Act because he has the authority to direct the work of employees utilizing independent judgment.

The College Station job is the only job that falls within the geographical scope of the 21 counties encompassed by the petitioned-for unit. The College Station job consists of mechanical insulation work to be performed at a new hospital building and remodeling of an existing hospital building. Robins & Morton is the general contractor on the project. Ivey Mechanical is the mechanical subcontractor and it subcontracted the Employer to perform the insulation work. Under its contractual obligations, the Employer is to complete work in phases including (1) site work (underground), (2) 1st floor work, (3) 2nd floor work, (4) central plant work, and (5) existing building (remodel).

The subcontract agreement calls for the College Station job to commence on March 24, 2004 and to be completed no later than July 1, 2005. However, according to Vice-President Rick

Armendariz, the job did not actually commence until around mid to late July 2004. The contract contains a liquidated damages clause (Article 3.3.1) and contractor's remedies clause (Article 3.4) that provide for the assessment of "back charges" or deduction of reasonable costs against the Employer if it fails to cure deficiencies after three working days of receipt of notice from the Contractor. The contractual agreement sets forth a total contract price of $234,000 broken down in value by description of work as follows: site work $9,200; 1st Floor $94,800; 2nd Floor $78,600; central plant $31,300; and existing building remodel $20,100. As of September 30, 2004, the total work completed by percentage and value was as follows: site work (underground)—100% or $9,200; 1st floor—93% or $89,000; 2nd floor—84% or $66,350; central Plant—77% or $24,300; and existing building (remodel)—0% or $0.

Armendariz testified, without rebuttal, that all work with the exception of the existing building remodel would be complete, as dictated by Ivey Mechanical and Robins & Morton, around October 22, 2004. Armendariz testified that the Employer will lay off all College Station employees on or around October 22, 2004. At that point there will be a lull of several months because work on the existing building remodel cannot commence until after the existing building is vacated.

After the new building is complete, the hospital will begin to move its operations into the new building vacating the old or existing building. The record reflects that this move will occur in phases and as the existing building is vacated, the general contractor and mechanical subcontractor will complete their portion of the work. After the pipes and ducts have been installed, the Employer will be able to complete the insulation work and its obligations under the contract. The uncontradicted evidence revealed that the existing building (remodel) job consists of approximately three to four weeks of work to be completed sporadically (i.e. two days here

and two days there) depending on how and when the existing building is vacated. The existing building remodel work is projected to commence, at the earliest, around early December 2004, but will likely commence around January 2005. The Employer intends to hire two to three new employees to complete the remodel. The contract calls for a completion date of no later than July 1, 2005, to avoid penalties, but Armendariz testified, without contradiction, that the job would likely be complete well before the deadline.

According to Armendariz, the Employer has never performed any other work in the petitioned-for area and only bid this job at the invitation of Ivey Mechanical. Ivey Mechanical has not invited the Employer to bid on any other projects in the petitioned-for area and the Employer has no plans to bid on any more work in the petitioned-for area.

The Petitioner presented testimony from past and present College Station employees William R. Frey, Jr., Antonio Maldonado, Marco A. Pozos and Felipe Correa that during various conversations Watson told them that the Employer intended to seek more work in the area and that the Employer would recall them when the existing building remodel got underway. The Petitioner also presented Union Organizer Mauro Carrasco who testified that during a telephone conversation around June 2004, Rick Armendariz told him that the Employer was seeking to expand or establish itself in the area.

Armendariz denied the statement attributed him by Carrasco. Armendariz further testified that Watson has no authority to bid on new jobs, to estimate the length of jobs or to set personnel policies. The record reflects that Armendariz is responsible for all job bidding and personnel practices, that all College Station employees would be laid off on or around October 22, 2004 and that the Employer would hire between two to three new employees from the area to complete the remaining work on the existing building (remodel) when the time came.

Analysis—Imminent Cessation of Operations

The Employer contends that the petition should be dismissed because it is ceasing operations in the petitioned-for unit and thus an election would serve no useful purpose. The Petitioner disagrees with the Employer and argues that the Employer is actually planning to expand its operations into the petitioned-for area. As discussed below, I conclude that there would be no useful purpose in directing an election for the unit proposed by the Petitioner.

As stipulated by the parties, this case involves a construction industry petition. I am mindful that this is a construction industry case and only in limited circumstances will the Board dismiss a construction industry petition based on a representative complement issue. However, it is well established that if an employer's project is scheduled to wholly terminate within a relatively short period of time from the date of the representation hearing, the Board has found no useful purpose would be served by directing an election. ***Davey McKee Corporation,*** 308 NLRB 839 (1992); ***M.B. Kahn Construction Co.,*** 210 NLRB 1050 (1974).

In ***Davey McKee,*** the Board dismissed the petition where the record reflected that the employer was imminently ceasing all work, therefore dissolving the unit sought. The Board found that the employer was imminently ceasing operations because all of the employer's current jobs were soon ending and the evidence of pending job bids was uncertain. The Board, citing prior decisions, held that where an employer's operations are scheduled to terminate within three to four months that no useful purpose is served by directing a petition.

Similarly, in ***M.B. Kahn,*** the Board dismissed a petition because of the imminent completion of the construction project. In that case the hearing was held on December 13, 1973. The evidence adduced at the hearing reflected that the project commenced on or about April 1, 1973 and was expected to be completed between June and July 1974 at which time all employees

would be terminated. The first major phase of the work was to be completed by March 14, 1974. The Board found that the project dates were expected to be met and the overall project was on schedule for completion. Moreover, it appeared that the employees involved were recruited from the area and the employer did not have any work in the area, other than the project at issue, and did not contemplate any in the future. The Board held that it would serve no useful purpose to conduct an election in the units therein.

The record in the instant case reveals that the Employer began work on the College Station job around July 2004. The College Station job encompasses insulation work at a new hospital and remodeling work at the old or existing hospital building. Pursuant to Article 9.3 of the subcontract, the Employer must complete all work no later than July 1, 2005. By around October 22, 2004, the Employer will have completed all work on the new hospital building at which time there will be a lull in work as the existing or old hospital building is vacated. Of the $234,000 value of work, the work on the new building constitutes approximately $213,900 or over 91 percent of the total job. The remaining existing building remodel work constitutes less than ten percent of the contract price. The Employer will commence final work at the earliest December 2004 on the existing building (remodel). In the interim, the record reflects the Employer plans to lay off all employees encompassed by the petition. After the work on the existing building commences, the record reflects the Employer intends to hire between two to three new employees to complete the remaining three to four weeks of work. The remaining work will be done in phases depending on the pace that the building is vacated. The record reflects that the Employer is subject to liquidated damages or the Contractor may pursue causes of action against the Employer if it does not meet the specified completion date.

I recognize that the remaining remodel work will be done over a period of time that could last up to nine months from the date of hearing. However, the record evidence established that such work will amount to no more than three to four weeks of total work to be done by no more than two to three new employees on an intermittent basis.

Aside from its efforts to complete the work on the College Station job, the Employer has never performed any other work in the geographic area petitioned-for by the Petitioner. The Employer has no other jobs in the area, no outstanding bids for any new projects in the 21 county petitioned-for area and no plans to bid on any jobs within this area.

Regarding staffing, the record reflects that the Employer has hired local employees to staff this project as needed. At the height of the project the Employer employed 17 insulators and helpers/laborers and at the time of the hearing employed around 13 such employees. After work on the new building is complete, the uncontradicted evidence shows that the Employer will lay off all employees. The remaining work will be completed by two or three new employees that the Employer plans to hire when work on the existing building (remodel) commences.

The Petitioner through its past and present employee witnesses argues that the Employer is not ceasing operations in the area and intends to expand operations into the area. The Petitioner relies on a contested statement by Vice-President Armendariz and statements allegedly made by the Employer's supervisor. Even assuming *arguendo* that such statements were made by the Employer, they do not detract from the fact that the project will be substantially completed on or about October 22, 2004 and the remaining work constitutes less than ten percent of the job. Likewise, such speculative statements alone, even if made, do not overcome the record evidence detailing the project's scheduled completion date and the Employer's lack of any other pending contracts or bids in the area or intention to bid for work in the area. As in

M.B. Kahn, supra, and ***Davey McKee,*** supra, the record evidence establishes that the Employer has no intention of bidding for work or remaining in the petitioned-for area. *Cf.* ***Fish Engineering & Construction,*** 308 NLRB 836 (1992) (where the Board distinguished ***Davey McKee*** and found an immediate election warranted where the employer had completed four projects in the past year, two of which were ongoing at the time of hearing, and had a pending bid for future work in the area with the same contractor.) The record evidence here did not establish that the College Station employees have a reasonable expectation for future employment with the Employer. Rather, the evidence established that on or about October 22, 2004, the petitioned-for unit will no longer exist as there will be no present employees employed much less a substantial and representative complement.

Based on the foregoing, I find that a preponderance of the record evidence establishes that the Employer's College Station job will be substantially completed on or about October 22, 2004, and entirely completed no later than July 1, 2005. The Employer has no additional work in the area and no present intention to bid on work in the area. The record establishes that no current employee encompassed within the petition will remain employed with the Employer after October 22, 2004, or that he will have a reasonable expectation for future employment. Without evidence demonstrating that the Employer will not meet the contractual time targets or that the Employer has other pending work or bids in the petitioned-for area, the Petitioner's assertion that the Employer intends to expand its operations into the area is speculative at best.

Accordingly, I conclude that it would serve no useful purpose to conduct an election at this time and I shall dismiss the petition on that basis. ***Davey McKee,*** supra; ***M.B. Kahn,*** supra. If the petitioned-for unit remains in existence for a substantially longer period of time than is

now anticipated or should the Employer secure a contract for a new project within the geographical scope of the petitioned-for unit, the Petitioner may move to reinstate the petition.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The parties stipulated, and I find, that the Employer, Dynasty Insulation, Inc., a Texas Corporation with its home office in El Paso, Texas, is engaged in business in the construction industry as an insulation contractor. During the preceding twelve months, a representative period, the Employer in conducting its business operations performed services valued in excess of $50,000 in states other than the State of Texas.

3. The Petitioner claims to represent certain employees of the Employer.

4. The parties stipulated to the Petitioner's labor organization status.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request

must be received by the Board in Washington by 5:00 p.m., EST **on November 4, 2004**. The request may **not** be filed by facsimile.

Dated: **October 21, 2004**

/s/ Curtis A. Wells

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